Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDC, OLC

Introduction

This matter dealt with an application by the Tenants to cancel a Notice to End Tenancy for Cause, for compensation for damage or loss under the Act or tenancy agreement and for an Order that the Landlords comply with the Act, Regulations or tenancy agreement.

At the beginning of the hearing, the Landlords sought to have this matter dismissed as they claimed that it is not a dispute that falls under the Residential Tenancy Act. Consequently, I advised the Parties that I would hear evidence only with respect to the issue of jurisdiction.

Issue(s) to be Decided

1. Does this dispute fall under the jurisdiction of the Act?

Background and Evidence

One of the Landlords is a non-profit society and the other, L.L., is an executive director of that society. The rental property is a farm on which there is a house. The Landlords said the property was leased to the Landlords by an anonymous donor for use as transitional housing. The Landlords said in order to convert the property into transitional housing, however, the existing house required extensive renovations and a new addition built onto it. The Landlords said that when they purchased commercial insurance for the property, it was a condition of eligibility that the property not be unoccupied for more than 60 days. The Landlords said they rely on volunteers to supply work and materials and therefore they knew it would likely take longer than 60 days to complete the needed work.

However, the Landlords said they were also restricted under the terms of their lease from assigning or subletting the property. Consequently, the Landlords said they determined that if the property was occupied by “house sitters” this would satisfy the conditions of insurance as well as the terms of their lease and deter vandalism. The Landlords said they also decided that they could not charge rent for the house while it was actively being renovated and could not make revenue as a non-profit society. However, the Landlords said they also decided that it would be to the Society’s

advantage to have the house sitters pay utilities (heat and hydro) for the property in order to relieve the Landlords from that expense. The Landlords said on the advice of their accountant, they made it a term of the agreement with the Tenants as follows:

> "*the tenants agree to pay the combined cost of Fortis Gas and BC Hydro's utility bills each month* ***or a minimum of $200.00 per month****, whichever amount is greater*. *At the end of each month the treasurer of [the Society] will advise the tenants of the utilities owing. If the amount is greater than $200.00 the rent will be adjusted accordingly each month*."

LL said in one month the Tenants paid the $200.00 minimum stipulated in their agreement but when they received the utility bills the following month, the utility charges were less than $200.00 so the difference between $200.00 and the actual utility charges was credited to the Tenants for another month. Consequently, the Landlords argued that the Tenants did not pay rent which they estimated would have been $1,200.00 to $1,500.00 at market rates. The Landlords admitted that the Tenants were required to pay a security deposit of $100.00 to compensate them for any damages to the property.

The Landlords also claim that prior to offering the use of the property to the Tenants, they made it very clear that parts of it were being renovated while others (the addition) were under construction. Consequently, L.L. claimed it was necessary to facilitate volunteer workers who could often not give a lot of advance notice while respecting the Tenants' privacy rights so two further terms were inserted into the agreement as follows:

> "*Except in the case of an emergency, the landlord shall not enter the premises without the consent of the tenants unless the landlord has given verbal notice in advance of the entry, and the time stated is between 9:00 am and 9:00 pm. While the residence is under renovation/*construction, notification and time may vary or may not be applicable.
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> *In scheduling any renovations, the landlord will try to be as accommodating and respectful as possible. All contractors and volunteers working on the house will be asked not to be disruptive and/or obtrusive to the tenant's space or privacy*."

The Parties agree that the Landlords have always given the Tenants notice of entry usually by text messaging. The Landlords argued the reason for giving notice of entry to the Tenants was to be respectful only. The Landlords said it was never their intention that the Tenants would have exclusive possession of the rental unit but instead that they would share possession with the Landlords. The Landlords said the Tenants occupied only the upper floor of the house while the lower floor was used for the Landlords' purposes to store tools and materials.

The Landlords said they also made it clear to the Tenants before they entered into the agreement that it was going to be a temporary arrangement that would end once the construction and renovations were completed. Consequently, the L.L. said it was a further term of the agreement that "*a notice of termination is to be served by the tenants*

to the landlord or the landlord to the tenants a minimum of one month before the date for payment of rent."

The Tenants argued that L.L. led them to believe that they were entering into a residential tenancy. The Tenants said they were never advised by L.L. that there was a lease which prevented the Landlords from subletting. The Tenants said that while they were aware it was a temporary arrangement, they were advised by L.L. that she would give them 2 months advance notice of when the property would be used as transitional housing. The Tenants claimed they were induced by L.L. to enter into the agreement based on her representation "that they would have "*cheap rent.*" The Tenants said they were also led to believe it was a tenancy because the Landlords gave them receipts for "rent," required them to pay a security deposit and to complete a condition inspection report. The Tenants argued that agreement itself was entitled, "Tenant Agreement," it referred to them as "tenants", to the payment of "rent," gave them a right to notice of entry by the Landlords, and a right to Notice when the Landlords intended to end the tenancy. The Tenants also noted that many other terms set out in the agreement referred to their rights and obligations as tenants under the Act.

The Tenants argued that they were also given exclusive possession of the rental unit. The Tenants denied that they were only given the use of the upper floor and argued instead that L.L. advised them that they would have the use of the whole property and the agreement did not restrict their occupancy to only part of the property. The Tenants said that was why L.L. asked them for permission to use the lower floor to store some cabinets and they agreed. The Tenants denied there were any tools stored in the lower level. The Tenants said they also used one bedroom and a bathroom on the lower level for a guest. The Tenants also claimed that L.L. always asked their permission to work from the rental property when contractors were working. The Tenants also argued that the Notice of Termination given to them by L.L. on January 30, 2012 stated (in part) that the tenants were to "deliver up possession of the premises." The Tenants argued that these matters contradicted the Landlords' assertion that they did not have exclusive possession.

The Parties' agree that the renovations and construction has not yet been completed. However, the Landlords claim that they wish to terminate their agreement with the Tenants because the Tenants had a verbal altercation with one contractor and had a disagreement with L.L. when they discovered that their cat had sustained an injury shortly after it was confined to a room in the property by L.L. or a contractor without their consent. L.L. said she anticipates that the renovations and construction may soon be completed at which time the property will be used for transitional housing.

Analysis

RTB Policy Guideline #9 (Tenancy Agreements and Licences to Occupy) says as follows:

> *"If there is exclusive possession for a term and rent is paid, there is a presumption that a tenancy has been created, unless there are circumstances that suggest otherwise…. In order to determine if a particular arrangement is a license or tenancy, the arbitrator will consider what the parties intended, and all of the circumstances surrounding the occupation of the premises.* ***Some factors that may weigh against finding a tenancy are:***
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> - *The payment of a deposit is not required;*
> - *The owner, or other person allowing occupancy, retains access to, or control over, portions of the site;*
> - *The occupier pays property taxes and utilities but not a fixed amount for rent;*
> - *The owner, or other person allowing occupancy, retains the right to enter the site without notice;*
> - *The parties have a family or other personal relationship, and occupancy is given because of generosity rather than business considerations;*
> - *The Parties have agreed that the occupier may be evicted without a reason, or may vacate without notice.*
>
> *The Arbitrator will weigh all of the factors for and against finding that a tenancy exists, even where the written contract specifies a licence or tenancy agreement."*

Although the Landlords argued that the Tenants did not pay rent, I find that the terms used in the tenancy agreement as well as the practice of the Landlords to issue receipts for "rent" suggests otherwise. In particular, the tenancy agreement provides for the payment of a minimum of $200.00 per month even if the actual utility charges were less than that. The tenancy agreement also provides that where the charges were more than $200.00, "***rent*** would be adjusted accordingly." The Tenants also provided receipts from the Landlords for their payments each month and on each receipt the payment is stated as being for "***rent***." Consequently, even if the Landlords decided in one month to credit the Tenants where the actual utility charges were less than $200.00, I find that it was at all times the intention of the parties that the Tenants would pay rent.

Given that the Tenants paid rent on a monthly basis and that the Landlords required the Tenants to pay a security deposit, I find that there is a presumption that a tenancy was created. I also find that under the terms of the Parties' agreement, the Landlords did not have the right to enter the rental unit without giving the Tenants notice and neither party had a right to terminate the agreement without giving 30 days notice to the other party. Furthermore, the tenancy agreement is silent on the reasons for which the Landlords could end the tenancy and the evidence of both parties was that they anticipated the tenancy would end when the renovations and construction were completed.

The Landlords argued that they entered into the agreement with the Tenants out of generosity rather than business considerations however I find that this is not entirely accurate. In particular, L.L. admitted that the Landlords would not have qualified for

commercial insurance if the property was unoccupied for more than 60 days. L.L. also admitted that given that there would be ongoing construction, it would be disruptive to any occupants and therefore the offer of "cheap rent" was devised as an incentive to find an occupant which is consistent with the Tenants' evidence. In other words, although L.L. claimed that the market rent for the property would be substantially higher, I find that unlikely in the situation where a property was actively under renovation and construction. L.L. also admitted that a minimum monthly payment of $200.00 was devised as she believed any payment over the actual cost of utilities would be applied to the Landlords' costs associated with "wear and tear." Consequently, I find that part of the reason for entering into the agreement with the Tenants was motivated by generosity however I find that the overriding consideration was for business reasons.

I find that the only part of the rental property to which the Landlords retained access or control was the addition under construction. I find that the Landlords did not retain access to or control over portions of the existing building occupied by the Tenants. I find that the Landlords only retained access to or control over the new addition to the property. The Landlord, L.L. admitted that she always gave notice to the Tenants when she needed access to the rental unit which she would not need to do had the Landlord retained the right to "share possession" of the rental unit as she claimed.

I find that the only evidence of an intention to create a licence to occupy is the wording of the preamble on the parties agreement which states as follows:

> "In consideration of the mutual benefits and promises herein, The Parties agree that in the capacity of house sitting …"

However the following sentence in the preamble states, "the Tenants will rent the residence," and the balance of the agreement as stated above, refers to the payment of rent and a security deposit, and to the rights and obligations of the Parties that are required for residential tenancies under the Act (eg. Sections 29, 31, 32 and 45). I also note that the document itself is titled, "Tenant Agreement." Consequently, I find that there is little evidence to displace the presumption that a tenancy was created.

The Landlords also argued that they never intended to sub-let because that was contrary to the terms of their Lease. The Landlords provided a copy of a document identified as a lease with the Society being named as a tenant. While most of that document has been blacked out, the Landlords left visible Clause 1(e) which states, "not to assign or sub-let without the prior written consent of the Landlord, which consent may be arbitrarily withheld." I find that this clause contradicts the Landlords' assertion that they were not permitted to sublet; instead, the clause makes it clear that subletting may be permitted but the Society required the prior consent of the Landlord.

Consequently, I find that there is a residential tenancy and that the Act applies to this dispute. As a further consequence, I find that the "Notice of Termination" the Landlords served on the Tenants on January 30, 2012 is not an effective notice because it does not comply with s. 47, s. 49 or s. 52 of the Act. This means that if the Landlords wish to

end this tenancy they will have to re-serve the Tenants with a Notice to End Tenancy on an approved form.

Conclusion

The Tenants' application to cancel a Notice to End Tenancy is granted. The Tenants' application for compensation and for an Order that the Landlords comply with the Act, Regulations and tenancy agreement is dismissed with leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: February 24, 2012.

Dispute Resolution Officer